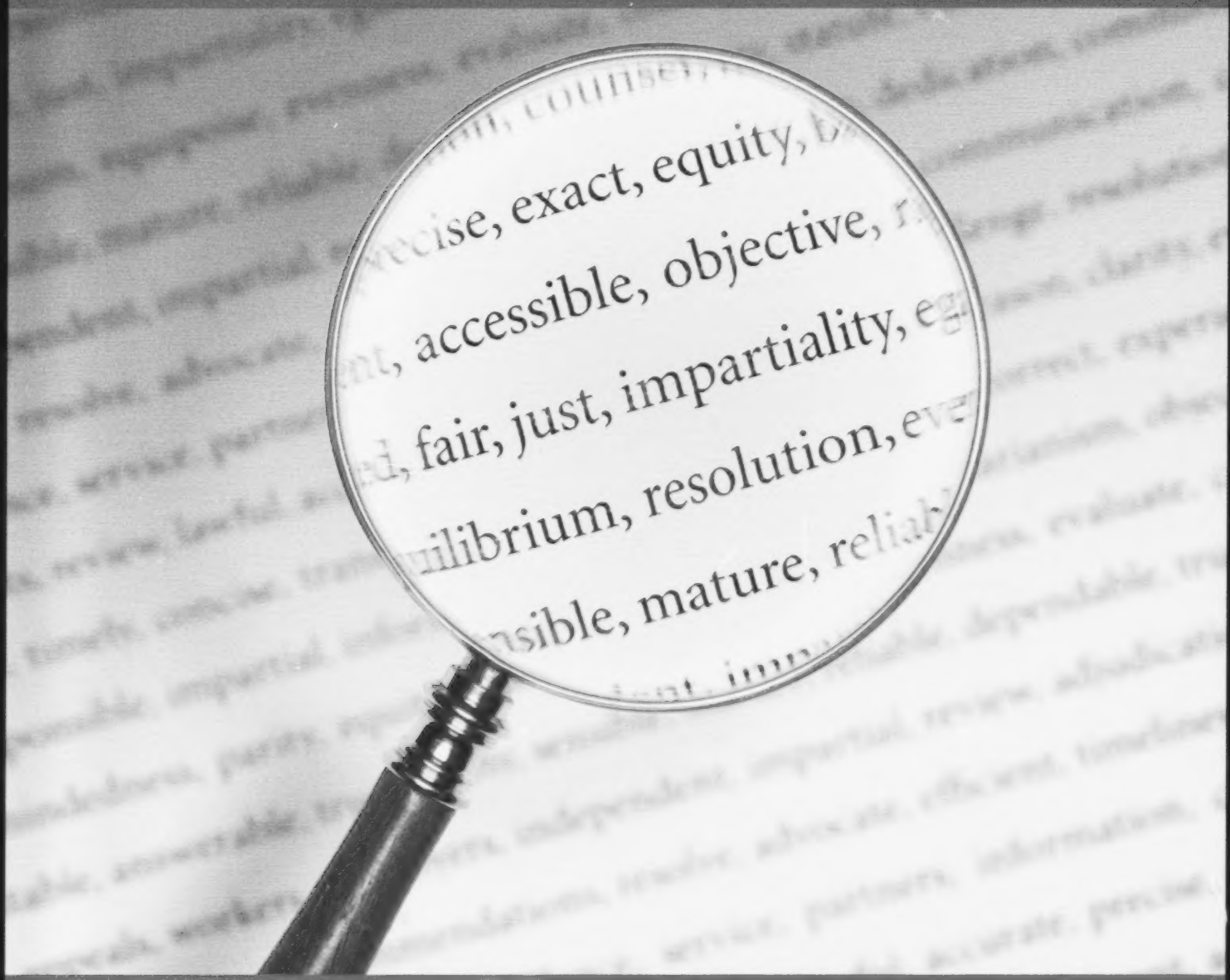
Workers' Compensation Appeals Tribunal

Annual report
for the year ending March 31, 2011



NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

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Annual report
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Workers' Compensation
Appeals Tribunal

Tribunal Personnel 2010–11

Colleen Bennett
Supervisor, Office Services

Charlene Downey
Secretary/receptionist

Melanie Fisher
Secretary

Samantha MacGillivray
Secretary

Diane Smith
Scheduling coordinator

Appeal Commissioners

Louanne Labelle
Chief Appeal Commissioner

Leanne Rodwell Hayes
Alison Hickey
Glen Johnson
Gary Levine
Brent Levy
Sandy MacIntosh
Andrew MacNeil
David Pearson
Andrea Smillie

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Executive Summary

The Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of hearing officers of the Workers' Compensation Board (the board) and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board and ensures an independent and impartial review of board decisions.

The tribunal also works with several partner agencies within the framework known as the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety division of the Department of Labour and Advanced Education.

This annual report highlights the processing and adjudication of appeals as well as the tribunal's participation in joint initiatives with system partners.

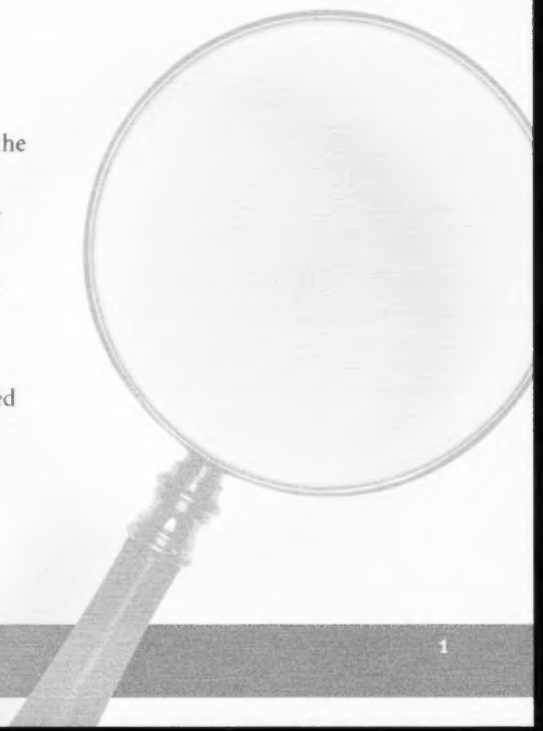
Operations Overview

Operational trends this year indicate that the tribunal's appeal volumes remain comparable to last year. The tribunal received 821 appeals in 2010–11, compared to 849 in the previous year. Although appeal volumes remained constant, the number of decisions issued by the tribunal decreased from 783 in 2009–10 to 617 in 2010–11.

This decrease in decisions is due to appeals taking longer to schedule for hearing, as both employer participation and proportion of workers represented by WAP have increased.

Fewer appeals were resolved, and it took longer to resolve appeals. At year-end, 596 appeals remain to be resolved, compared to 475 last year. Approximately 57 per cent of decisions were released within six months of the date the appeal was received, compared to 65 per cent in the previous year.

In the past, many workers who appeared before the tribunal, particularly workers appealing chronic pain decisions, were unrepresented or had representatives who were not members of the WAP. In 2009–10, there was a marked change in representation: WAP represented 62 per cent of workers and 38 per cent of workers were either not represented or represented by injured worker groups. The trend toward increased representation continued this year: 58 per cent of workers were represented by WAP on resolved appeals, and of the 596 outstanding appeals at year-end, 77 per cent of workers were represented by WAP.



Employers participated in 29 per cent of the resolved appeals in 2010–11 and are participating in 38 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented, but can benefit from the advice offered by the Employer Advisor Program. The tribunal communicates directly with unrepresented participants – whether they be workers or employers – to provide them with information on appeal processes.

During the year 2010–11, entitlement to new or increased benefits for permanent impairment was again the issue most often on appeal, representing 28 per cent of issues on appeal, whereas entitlement to chronic pain benefits and recognition of claim were equally represented at 16 per cent of issues on appeal.

The tribunal heard most appeals (74.5 per cent) by way of oral hearing, an increase from last year's total of 68 per cent.

Outcomes on appeal for the year 2010–11 remained constant. The overturn rate (appeals allowed or allowed in part) by the tribunal decreased slightly to 43 per cent from 45 per cent the year previous. The number of appeals referred back to the hearing officer increased to 17 per cent, from 13 per cent. The number of appeals denied decreased to 40 per cent, from 42 per cent. The number of appeals withdrawn decreased to 82 from 97.

Appeals continue to be filed predominantly by workers (97 per cent).

Appeals to the Court of Appeal increased slightly during 2010–11 to 12 (1.9 per cent of decisions rendered) from 8 the previous year. At year end, 11 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 5 appeals were denied at the leave stage and 2 were denied on the merits, upholding the tribunal's decisions.

The tribunal continued to issue a consistent and coherent body of decisions, providing clarity and guidance to adjudicators, injured workers, and employers throughout the system.

Again I would like to recognize this year the individual contributions of all tribunal staff to the efficient and fair resolution of appeals during this past year. Their dedication and commitment ensured that the tribunal maintained not only its efficient operations, but also the standard of quality and consistency expected by all participants.

Strategic Planning

The fair, efficient, and timely processing of appeals remained a priority for the tribunal throughout 2010–11. In light of the developments in the system affecting these priorities, the tribunal contracted an independent facilitator to assist with a strategic planning process.

The work unfolded in two stages. The first stage involved consultations with key stakeholders to identify strategic issues and opportunities. The second stage consisted of a facilitated process with tribunal staff using that input to develop consensus around multi-year strategic priorities and actionable initiatives.

A key priority identified in the tribunal's strategic planning process is to engage our partners in developing strategies to improve timeliness while ensuring that participants have a reasonable opportunity to prepare their case.

Another issue identified for strategic development involved the impact of increasing employer participation and the resulting need to educate employers, with the ultimate goal of providing hearings that both workers and employers perceive to be fair.

Initiatives will also be developed regarding decision quality, to achieve a level of system learning that continuously improves the quality of decisions.

Finally, the tribunal will endeavour to adopt a systematic approach to identifying opportunities for early resolution and for diverting files from the appeal system in a way that everyone supports.

Interagency Cooperation

As Chief Appeal Commissioner, I am a member of the Heads of Agencies Committee, which oversees implementation of the WSIS strategic plan. I also meet regularly with the Chief Workers' Adviser, the Manager of Internal Appeals, the Manager of the board's Client Services department, and board legal counsel to discuss issues arising from the adjudication of claims and appeals. This group forms the Issues Resolution Working Group (IRWG) whose mandate is to develop and implement issue resolution initiatives to support improved communication, information sharing, and overall efficiency of the workers' compensation system.

During 2009–10, IRWG collaborated on developing an Issues Resolution Strategy Framework, a document outlining our efforts to improve issue resolution by focusing on three components: improving decision quality, encouraging early resolution, and reducing litigiousness. The document was shared with stakeholders, who were invited to comment on the strategy and to collaborate in the implementation of initiatives to support the strategy.

A key initiative that followed was the creation of a WSIS liaison officer pilot project at the Internal Appeals level of the board to support the early resolution component of the strategy. This position built upon the success of the special projects officer pilot at the tribunal. The tribunal hosted two stakeholder consultation sessions on April 7, 2010, to explain, and gain support for, the initiative and later, on September 27, 2010, to provide stakeholders an opportunity to provide feedback on their experiences. This resulted in the extension of the pilot project for another year.

A second initiative involved developing a facilitation process at the tribunal level. In the fall of 2010, the tribunal created a working group with partner agencies to examine and design a facilitation process that would encourage resolving appeals sooner and without the necessity of an appeal hearing. The working group's report, expected in April 2011, will be implemented in the new year.

An IRWG sub-committee, the Appeal Issues Discussion Group, examined issues surrounding the adjudication of hearing loss claims. The tribunal prepared a compendium of recent cases outlining the difficulties in such adjudication. This group continues to monitor progress on these claims in an effort to promote consistency throughout the system.

Interaction with Stakeholders

Tribunal members take the opportunity to speak to injured workers' groups and employer representatives to inform participants and obtain feedback on tribunal processes. As mentioned, we held two consultation sessions on new initiatives dealing with issues resolution.

On May 25, 2010, the tribunal participated in a day-long workshop organized by the Office of the Employer Advisor, entitled Employer Participation in board and tribunal appeals. The workshop included a mock tribunal hearing put on by the tribunal with the assistance of WAP and employer representatives. Over 100 employers participated in the informative workshop.

On a yearly basis, I meet with the board's Board of Directors to bring them up to date on operations at the tribunal. I also attend the stakeholder consultation sessions hosted by the coordinating committee (the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors) where employer and worker representatives discuss future directions for the system.

On May 11, 2010, the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors hosted the sixth annual meeting of stakeholders. This was an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on tribunal operations.

Financial Operations

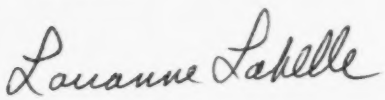
In 2010–11, the tribunal's total expenditures were within 75.5 per cent of the original authority and within 97.4 per cent of our revised forecast. Net expenditures totaled $1,518,100, a slight decrease from the previous year.

Key Initiatives for the Coming Year

The tribunal's strategic plan has identified timeliness as a key priority, and we will engage our partners (including WAP) in developing strategies to strengthen accountability to improve timeliness.

Other areas of concentration include

- consistent and high quality decision making, ensured by performance management and peer review
- simplified and fair appeal processes, ensured by continued efforts by the tribunal to educate, inform, and assist self-represented appeal participants, including the growing number of employers
- continued efforts to improve communication with system participants, such as injured workers and employer associations; we are responding to worker and employer surveys conducted in June 2009 and to the priorities established through our strategic planning initiatives
- continued cooperation with partner agencies within the workers' compensation system, particularly in developing an issue resolution strategy aiming at a less adversarial system
- implementation of facilitation processes at the tribunal level, as recommended by a joint committee representing the tribunal, WAP, and the board



Louanne Labelle
Chief Appeal Commissioner

Introduction

The Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of hearing officers of the Workers' Compensation Board (the board) and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board and ensures an independent and impartial review of board decisions.

The tribunal also works with several partner agencies within the framework known as the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety division of the Department of Labour and Advanced Education.

This annual report highlights the processing and adjudication of appeals as well as the tribunal's participation in joint initiatives with system partners.

Tribunal Mandate and Performance Measures

While governed by the same enabling statute as the board, the tribunal is legally and administratively separate from it, and is ordinarily not bound by board decisions or opinions. This ensures a truly independent review of contested outcomes.

In the processing and adjudication of appeals, the tribunal strives to strike a balance between procedural efficiency and fairness. Its work is directed by principles of administrative law, by statute, and by decisions of superior courts.

Its performance is shaped by, and measured against, several parameters drawn from the act, and by its own survey of user groups.

The tribunal's decisions are written. Appeal commissioners strive to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions, as opposed to the legislated period of 60 days.

New appeals are processed within 15 days of receipt by the tribunal.

Essentially, the tribunal can hear an appeal within 45 days of receiving notice that the participants are ready to proceed.

Operations Overview

The tribunal's appeal volumes remain comparable to last year. The tribunal received 821 appeals in 2010–11, compared to 849 in the previous year (see Figure 1). Although appeal volumes remained constant, the number of decisions issued by the tribunal decreased from 783 in 2009–10 to 617 in 2010–11 (see Figure 2).

Please see Appendix containing specific data for the following figures.

Figure 1
Appeals Received

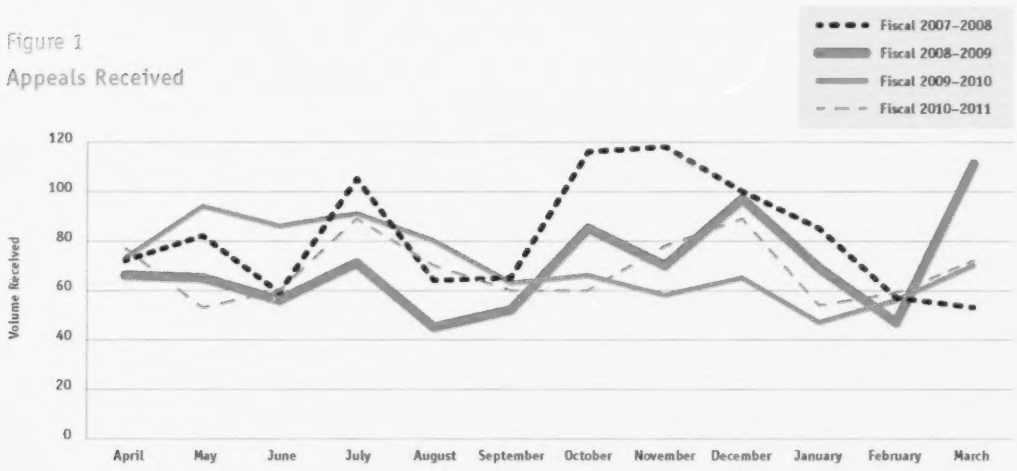
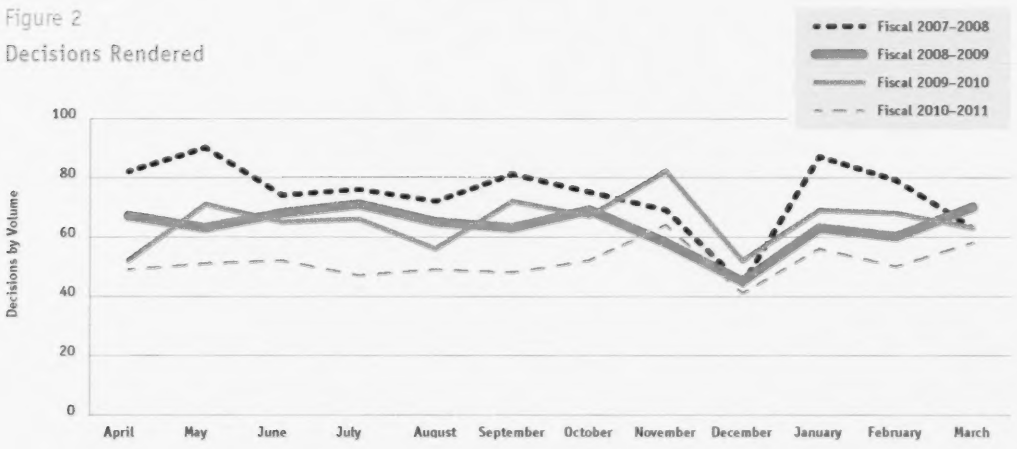


Figure 2
Decisions Rendered



This decrease in decisions is due to appeals taking longer to schedule for hearing, as both employer participation and the proportion of workers represented by WAP have increased.

Fewer appeals were resolved, and it took longer to resolve appeals. At year-end, 596 appeals remain to be resolved, compared to 475 last year (see Figure 3). Approximately 57 per cent of decisions were released within six months of the date the appeal was received, compared to 65 per cent in the previous year (see Figure 4).

Figure 3
Appeals Outstanding at Year End

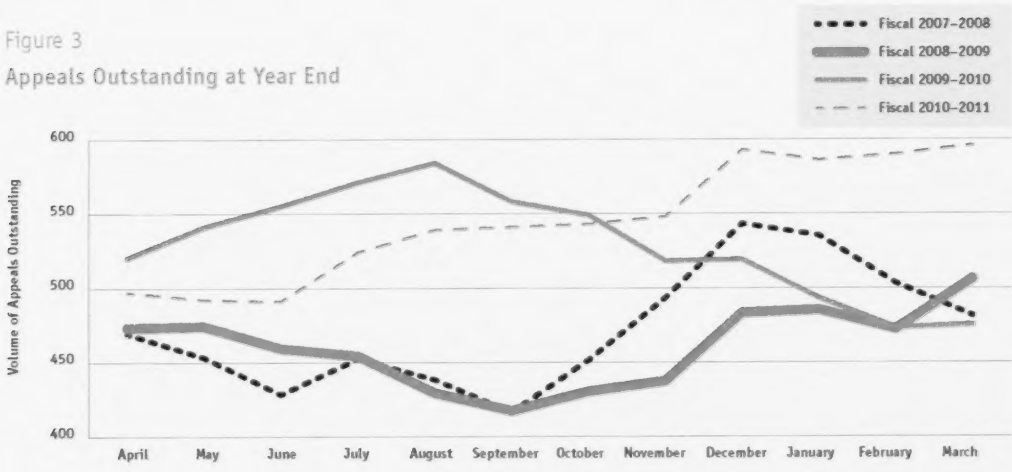
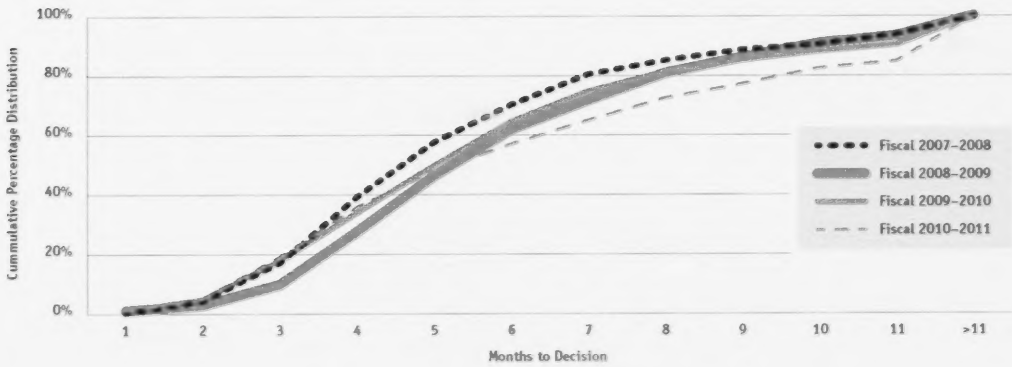


Figure 4
Timeliness to Decision



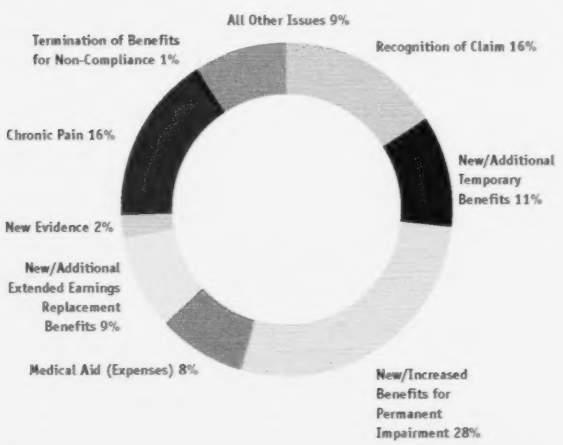
In the past, many workers who appeared before the tribunal, particularly workers appealing chronic pain decisions, were unrepresented or had representatives who were not members of the WAP. Overall in 2009–10, there was a marked change in representation as WAP represented 62 per cent of workers, and 38 per cent of workers were either not represented or represented by injured worker groups. The trend continued this year as 58 per cent of workers were represented by WAP on resolved appeals (see Figure 5). However, of the 596 outstanding appeals at year-end, 77 per cent of workers were represented by WAP.

Employers participated in 29 per cent of the resolved appeals in 2010–11, but they are participating in 38 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented, but can benefit from the advice offered by the Employer Advisor Program. The tribunal communicates directly with unrepresented participants – whether they be workers or employers – to provide them with information on appeal processes.

During the year 2010–11, entitlement to new or increased benefits for permanent impairment was again the issue most often on appeal, representing 28 per cent of issues on appeal, whereas entitlement to chronic pain benefits and recognition of claim were equally represented at 16 per cent of issues on appeal (see Figure 6).

Figure 5
Decisions by Representation

Figure 6
Decisions by Issue Categories – Worker


All Other Issues 9%
Termination of Benefits for Non-Compliance 1%
Recognition of Claim 16%
Chronic Pain 16%
New/Additional Temporary Benefits 11%
New Evidence 2%
New/Additional Extended Earnings Replacement Benefits 9%
Medical Aid (Expenses) 8%
New/Increased Benefits for Permanent Impairment 28%

In those appeals filed by employers, 43 per cent concerned the extent of benefits paid to a worker, 35 per cent appealed the initial recognition or acceptance of a claim by the board, and 22 per cent dealt with employer assessment (see Figure 7).

The tribunal heard most appeals (74.5 per cent) by way of oral hearing, an increase from last year's total of 68 per cent (see Figure 8).

Figure 7
Decisions by Issue Categories – Employer

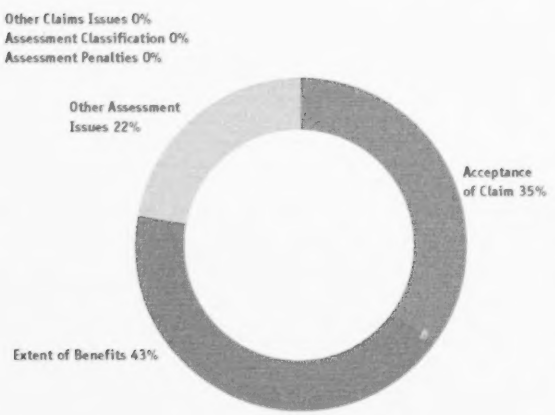
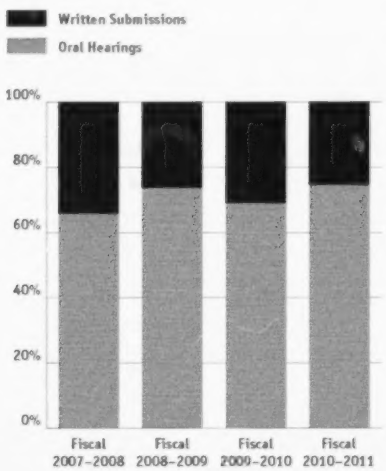


Figure 8
Decisions by Mode of Hearing



Outcomes on appeal for the year 2010–11 remained largely consistent. The overturn rate (appeals allowed or allowed in part) by the tribunal decreased slightly to 43 per cent from 45 per cent the year previous (see Figure 9). The number of appeals referred back to the hearing officer increased to 17 per cent as compared to 13 per cent. The number of appeals denied decreased to 40 per cent as compared to 42 per cent. The number of appeals withdrawn decreased to 82 from 97.

Appeals continue to be filed predominantly by workers (97 per cent) (see Figure 10).

Figure 9
Decisions by Outcome

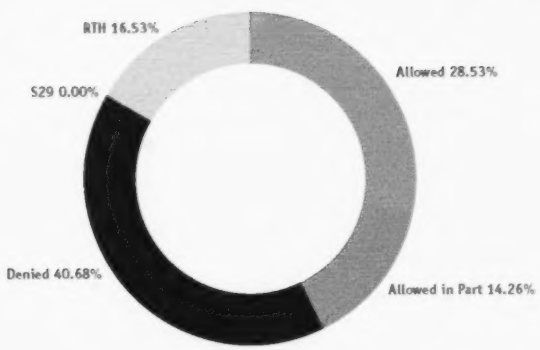
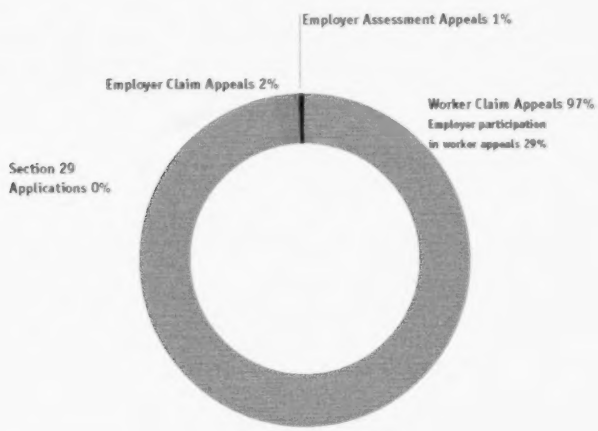
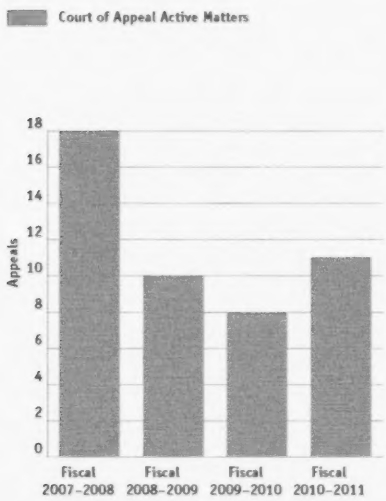


Figure 10
Decisions by Appellant Type


Employer Assessment Appeals 1%
Employer Claim Appeals 2%
Worker Claim Appeals 97%
Employer participation in worker appeals 29%
Section 29 Applications 0%

Appeals to the Court of Appeal increased slightly during 2010–11 to 12 (1.9 per cent of decisions rendered) from 8 the previous year (see Figure 11). At year-end, 11 appeals remained at the Court of Appeal. Of the decisions issued by the court this year, 5 appeals were denied at the leave stage and 2 were denied on the merits, upholding the tribunal's decisions.

Figure 11
Appeals Before the Courts at Year End



Tribunal-Appellant Interaction

The tribunal exists to adjudicate appeals by workers and employers from final decisions of the board, and to consider applications concerning the "right to sue" under s. 29 of the act. To improve service to participants in those appeals and applications, the tribunal regularly evaluates its interactions with participants.

Interaction with Stakeholders

Tribunal members take the opportunity to speak to injured workers' groups and employer representatives to inform participants and obtain feedback on tribunal processes. As mentioned, we held two consultation sessions on new initiatives dealing with issues resolution.

On May 25, 2010, the tribunal participated in a day-long workshop organized by the Office of the Employer Advisor, entitled Employer Participation in board and tribunal appeals. The workshop included a mock tribunal hearing put on by the tribunal with the assistance of WAP and employer representatives. Over 100 employers participated in the informative workshop.

Each year the Chief Appeal Commissioner meets with the board's Board of Directors to bring them up to date on operations at the tribunal. She also attends the stakeholder consultation sessions hosted by the coordinating committee (the Deputy Minister of Labour and Workforce Development and the Chair of the board's Board of Directors) where employer and worker representatives discuss future directions for the system.

On May 11, 2010, the Deputy Minister of Labour and Workforce Development and the Chair of the board's Board of Directors hosted the sixth annual meeting of stakeholders. This was an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on tribunal operations.

Appeal Management

The tribunal regularly reviews its appeal management process to ensure that sufficient information is provided to, and effective communication is used with, all participants in an appeal proceeding.

In processing appeals, a balance must be achieved between providing sufficient preparation time and ensuring that the process is timely.

Statistics demonstrate increasing delays between the date of filing and date of decision; therefore, the tribunal is revising its process to more tightly monitor appeals and to ensure compliance with the decision timeliness goals set out in our procedure manual. These changes include postponing a decision on the form of appeal (written or oral) unti
submitted and the appeal is ready to be heard, and f
status of an appeal by correspondence to all particip
intervals (3, 6, and 9 months). Unless exceptional ci
appeals are to be completed within 12 months. For a
more urgent in nature, the goal for resolution will b

The registrar continues to meet with the Worker's
monthly for updates on the status of appeals.

Most contested appeals are monitored for readine
scheduled conference calls.

The tribunal continues to contact unrepresented p
early in the appeal process to provide information o
answer questions, and potentially refer a participant
assistance.

Freedom of Information and Protection of Privacy

Tribunal decisions contain personal and business information, particularly medical information. Hearings are held in camera. The decisions are provided to appeal participants, including the worker, the board, and the employer. The decisions from January 2010 are now published on the Canadian Legal Information Institute's free public website at www.canlii.org. Decisions before January 2010 are available free to the public through the Department of Labour and Advanced Education Development website at www.gov.ns.ca/lwd/databases.

The tribunal is governed by Part II of the act. The legislation does not specifically permit the publication of decisions. However, the tribunal has adopted a practice manual, available online, which sets out the tribunal's procedures and rules for the making and hearing of appeals as authorized under s. 240 of the act.

The tribunal's practice manual advises of the publication of tribunal decisions and provides as follows:

> 14.00 PUBLICATION OF TRIBUNAL DECISIONS
> 14.10 General
>
> Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision. The Tribunal endeavours to exclude any information from the body of a decision which could identify the participants.
>
> Decisions made prior to January 1, 2010, without identifying features, are available through the Nova Scotia Department of Labour and Workforce Development website. The database is developed and maintained by the Nova Scotia Labour and Workforce Development Library. Anyone wishing to use the database should contact the Labour and Workforce Development Library at 422-1318.
>
> Decisions made after January 1, 2010, without identifying features, are available on the Canadian Legal Information Institute's free website: www.canlii.org.

14.20 Personal Identifiers in Decisions

Generally, decisions are written without personal identifiers for participants, except on the cover page. The names of participants, lay witnesses and others (where the use of names would tend to identify the participants), are not used in Tribunal decisions. Witnesses may be identified by their role, for example, the "worker" or the "employer", or by initials.

Expert witnesses may be referred to by name. However, if an appeal commissioner considers that the use of an expert's name might identify the participant, the expert witness may be referred to by title, for example, the worker's attending physician, or by initials.

The names of representatives will generally not be used in the body of a decision. Instead, they may be referred to by their role, such as the worker's representative. Board claim file numbers or employer registration numbers are not included in the body of a decision.

Quotations contained within Tribunal decisions are edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g., [the Worker].

A footnote at the bottom of the first page of every decision indicates that the participants have not been referred to by name in the body of the decision as the decision may be published. The publication versions of the decisions on public databases do not include any of the names of the participants nor claim numbers (which appear on the cover page of a decision).

Further vetting occurs after the decision has been released and prior to publication if circumstances warrant. Requests have also been made to withhold decisions from publication due to the extremely sensitive material contained in some of the decisions. These requests are considered and decisions may be withheld from publication.

The tribunal has adopted a "decision quality guide" which outlines quality standards for decision making. It includes a section concerning privacy issues, which states that "decisions should be written in a manner that minimizes the release of personal information." Ultimately, a decision maker must have the discretion to include in a decision reference to evidence that the decision maker finds relevant to support the findings outlined in the decision.

Worker claim files are released to employers after vetting by the tribunal for relevance. The tribunal's file release policy ensures compliance with FOIPOP without compromising the need of participants to know the evidence on appeal. Of particular concern to the tribunal is the need to ensure that personal worker information is not used for an improper purpose or improperly released or made public by a third party. The tribunal's correspondence accompanying file copies has also been revised to reflect these requirements and to refer to appropriate sanctions.

The tribunal rarely receives FOIPOP applications. Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board, unless there is an active appeal. If there is an active appeal, no FOIPOP application need be made by an appeal participant, as the act provides for distribution of relevant claim files to appeal participants.

Most FOIPOP applications for generic information particular to the tribunal are addressed through the tribunal's Routine Access Policy, which is posted on the tribunal's website.

Decisions for the Year 2010–11

The tribunal continued to interpret the act and board policies in the face of novel fact situations and legal questions. It has endeavoured consistently to elucidate the law in all of its decisions.

Noteworthy Decisions (by issue)

Entitlement

The issue of asymmetry in hearing loss received definitive treatment by the tribunal this year. It has been the position of the board's Consulting Audiologist, upon whose opinion many board decisions have been based, that noise-induced hearing loss (NIHL), will not result in a pattern of hearing loss that is asymmetrical, or deterioration that is asymmetrical. A document titled "Five Myths in Assessing the Effects of Noise on Hearing" by William Clark, Professor of Otolaryngology, is frequently relied upon for the board's position.

A panel of appeal commissioners in *Decision 2010-463-AD* (January 25, 2011) found that there was no requirement in board policy 1.2.5AR that an audiogram consistent with NIHL be symmetrical. The tribunal found that the worker had audiograms consistent with hearing loss and, having met all the requirements of the policy, she had, prima facie, an acceptable claim for hearing loss. The evidence before the panel, which included the Five Myths document and screening audiograms, were found to be insufficient to meet the employer's burden that it was more likely than not that the worker's hearing loss was not NIHL. For a number of reasons the Five Myths document was not found to be persuasive on the issue.

Other issues touched on by the tribunal this year regarding hearing loss included the application of apportionment principles in the presence of non-compensable hearing loss, the weight to be given to screening audiograms in determining entitlement, and the issue of deterioration of hearing after removal of the noise source.

In *Decision 2010-06-AD* (April 28, 2010), the tribunal preferred the properly conducted audiogram, which had been performed under controlled conditions, over screening audiograms performed by a plant nurse, which showed that the pattern of the worker's hearing loss was not consistent with NIHL. The tribunal noted previous tribunal decisions that highlighted the weaknesses of screening audiograms.

The tribunal looked at the nature of noise exposure in determining entitlement in *Decision 2010-198-RTH* (April 26, 2010). The tribunal considered the possibility that impulse or impact noise could produce a pattern of hearing loss different from steady-state noise.

Historically, the tribunal has accepted the premise that further deterioration of hearing does not occur once an individual is removed from the source of the noise. *Decision 2009-623-AD-RTH* (May 7, 2010), was interesting in that the tribunal considered evidence from an otolaryngologist, indicating that the 2002 ACOEM position paper on the progression of hearing loss had been seriously undermined. The matter was referred to the hearing officer to apply apportionment principles to the worker's hearing loss but the decision suggests that the issue of deterioration after removal from the noise source may not remain settled.

Arising Out Of and in the Course of Employment

The tribunal had a number of interesting cases this year involving the threshold issue of "arising out of and in the course of employment." These cases not only involved the recognition of particular physical conditions or diseases, but also recognition of injuries stemming from factual circumstances raising a question of whether they were work-related.

In *Decision 2010-846-AD* (June 30, 2010), the worker alleged that workplace stress over time had caused his high blood pressure, which eventually led to his stroke. There was no opinion evidence, however, linking the stroke to workplace stress. Nor was there sufficient evidence of stress in the workplace over time to have caused high blood pressure. This appeal was denied.

The work-relatedness of a worker's heart attack was considered by the tribunal in *Decision 2010-38-AD* (March 28, 2011). The worker had been lifting heavy sandbags and had a heart attack. The tribunal found that the worker's pre-existing heart disease was aggravated by his work duties, leading to a heart attack. There was insufficient evidence to rebut the presumption of causation contained in s. 10(4) of the act.

In *Decision 2010-450-AD* (January 24, 2011) the tribunal considered recognition of a claim by a retail store employee who fell in the mall parking lot on her lunch break. The tribunal denied the appeal, finding that the worker's injury did not occur on the employer's premises, and arose from a situation created by her personal choices, exposing her to risks the same as those to which members of the public would be exposed.

In *Decision 2010-284-AD* (March 23, 2011), the tribunal dealt with a worker who was employed as an on-call home support worker. She returned home between two of her assigned home visits to check for scheduling changes, and fell going up her steps. The tribunal found that the worker's activities at the time of her injury were within the sphere of employment and that there was a link between the risk of the injury and traveling for work.

Medical Conditions

In *Decision 2009-774-AD* (May 31, 2010), the worker sought recognition of plemorphic adenoma (a benign lung tumour) as a personal injury by accident arising out of and in the course of employment, on the basis of radiation exposure. The evidence indicated that plemorphic adenoma had no known medical etiology, but radiation exposure was thought to be contributory. There was no evidence other than the worker's assertions to link the plemorphic adenoma to the worker's employment, however, and the appeal was denied.

The worker sought to have his stress condition recognized in *Decision 2006-129-AD-CA* (September 30, 2010). At issue was whether the worker was exposed to work-related events which were, in the words of Board Policy 1.3.6, "unusual and excessive" compared to those experienced by an average worker in the "same or similar occupation." The tribunal found that Phalen Mine, while clearly more dangerous than the other mines in the Sydney coalfield, was not an unusual mine in terms of hazards, by industry standards. The worker's claim for work-related stress was denied. This decision contains a great deal of information on retreat long-wall coal mining, geology, the employer's history, and ground control methods (this decision is under appeal to the Court of Appeal).

In *Decision 2009-402-AD* (October 4, 2010), a worker sought compensation for sinus inflammation problems he claimed were caused by occupational exposure to an aerosolized cement mixture sprayed on walls in coal mines. The tribunal found that the worker was entitled to recognition of his occupational disease claim on the basis that his condition resulted from causes or conditions peculiar to this employment. The tribunal's decision on causation was based on strong expert evidence (this decision is under appeal to the Court of Appeal).

The tribunal, in *Decision 2010-09-AD* (April 29, 2010), considered the causal link between lung cancer and exposure to radon and silica, in the context of a claim for survivor benefits. The deceased worker had had pneumoconiosis. The tribunal found that there was no causal relationship established between the worker's pneumoconiosis and his lung cancer. Further, the worker's spouse had failed to establish that the various exposures alleged were causally connected to the development of his lung cancer.

Wilful Misconduct

In *Decision 2010-264-AD* (July 30, 2010) the tribunal considered s. 10(3) of the act; in particular, whether a personal injury was, "attributable wholly or primarily to the serious and wilful misconduct of the worker." The tribunal found that obesity did not constitute misconduct, which would remove a worker from the ambit of compensation.

In *Decision 2010-385-AD* (November 25, 2010), the issue of a worker's "misconduct" was again considered. In this case the worker had fallen from a roof after having climbed it contrary to his employer's instructions. The tribunal determined that although the worker's decisions may have been imprudent, they did not constitute "wilful misconduct" pursuant to the act.

Chronic Pain

The tribunal continues to define and clarify the parameters for compensation for "chronic pain" as it is defined in the act.

In *Decision 2010-68-AD* (May 27, 2010), the tribunal commented on an opinion of a board medical advisor which stated that to ground a finding of chronic pain there would have to be evidence of "ongoing pain that required treatment with medication, that caused ongoing psychological difficulties, that caused ongoing functional impairment and ongoing problems in activities of daily living." The tribunal stated that while such evidence would be helpful and certainly relevant to a finding on whether a pain-related impairment (PRI) was "slight" or "substantial," it was not essential to a finding of whether or not a worker's pain met the definition of "chronic pain" in the act.

In *Decision 2010-95-AD* (May 21, 2010), the worker sought a finding that he had "chronic pain" despite the presence of meralgia paresthetica, a condition involving thigh pain as a result of an injury to the lateral cutaneous nerve. The tribunal found that while meralgia paresthetica is an anatomic basis for pain, the condition did not provide an explanation for the worker's back pain, and the worker's appeal was allowed.

In *Decision 2010-136-AD* (June 29, 2010), the worker sought a permanent medical impairment (PMI) rating for a psychiatric impairment above and beyond the 6 per cent PRI he received. The tribunal found insufficient evidence upon which to base a finding that the worker's psychiatric condition was derived from his compensable injuries, other than as a result of his chronic pain.

The tribunal looked at the application of Table 18-3 in the AMA Guides, in *Decision 2010-636-AD* (February 2, 2011). The board had found the worker's impairment to be "slight" in the "activities of daily living" category of the AMA Guides, on the basis that many of her restrictions related to the impact of a subsequent non-compensable motor vehicle accident. The tribunal noted that in assigning a PRI, the board is to assess the impact that chronic pain has on the worker's activities of daily living. In doing so, it is not appropriate to say that the impact, although it could be viewed as "substantial," should be discounted to "slight" because it was caused in part by a non-compensable accident.

Extended Earnings Replacement Benefits

Decision 2008-670-AD (May 18, 2010) dealt with the board's choice of a long-term rate in calculating a worker's EERB. The worker's injury had occurred when he was 18, working a summer job. He had planned to attend university and become a physical education teacher. The tribunal found that the actual pre-accident earnings did not fairly represent the worker's loss of earnings as a consequence of his being under the age of 30. The tribunal based the worker's long-term rate on the post-accident employment he obtained, as it found that earnings as a physical education teacher were too speculative.

*In Decision 2009-90-*AD (August 26, 2010), the tribunal rejected the argument that failure to identify a specific job within a particular NOC classification would militate against a finding that work in that NOC classification is "suitable" for the worker.

The issue of what should be considered "earnings" in determining a worker's pre-accident earnings came before the tribunal in *Decision 2010-83-AD* (August 23, 2010). The tribunal determined that income that was derived from gambling and drug dealing, but which had been reported to Revenue Canada, did constitute "earnings" as per s. 38(b).

Decision 2010-222-AD (August 5, 2010) dealt with a worker who was provided a partial EERB based on his ability to work seasonally and receive employment insurance benefits in the off-season. The worker said that work was not reasonably available at the time his TERB was terminated and his EERB began. The tribunal acknowledged that a seasonal job may not be available at certain times of the year, but stated that to allow the appeal would cause unpredictability in the system, as anyone estimated with seasonal employment could take issue if the decision was made in the off-season.

Medical Aid

The tribunal allowed meal preparation as a form of attendant allowance in *Decision 2010-378-AD* (October 29, 2010). The worker was a widower who lived alone. The tribunal distinguished its decision from previous decisions denying benefits for meal preparation where the workers involved did not live alone and would not otherwise go hungry if not receiving assistance of this nature.

A worker sought an increase in the hourly rate he had been awarded for an attendant allowance, in *Decision 2010-352-AD* (December 16, 2010). The worker argued that the hourly rate for an attendant allowance should be in line with minimum wage. The tribunal held that the *Minimum Wage Order* did not apply to persons who provided services to the worker as part of an attendant allowance.

A worker sought payment by the board for a magnetic field therapy device to treat his vertigo. The tribunal determined by way of *Decision 2009-895-AD* (November 26, 2010) that such a device did not meet the criteria of board policy 2.3.1R as being consistent with standards of healthcare practices in Canada.

In *Decision 2010-650-AD* (January 31, 2011), the tribunal denied a worker's claim for reimbursement of medication purchased as far back as 1986, for which he had no receipts. Given the time that had passed since the alleged purchase of the medication, the lack of any evidence surrounding the purchase, and the board's inability to assess the worker's entitlement to the medication for the period for which it was being claimed, reimbursement was denied.

In *Decision 2010-686-AD* (March 15, 2011), the tribunal considered the worker's entitlement to medical aid in the form of medical marijuana. The tribunal denied the worker's claim on the basis that there was insufficient evidence to establish that the marijuana was appropriate for the compensable injury or consistent with standard of health care practices in Canada. However, it referred to a report from a board medical advisor, which it interpreted as implying that had the marijuana been taken orally as opposed to smoked, it might have been approved by the board. This case was noteworthy on that basis.

Commutation

The tribunal had several noteworthy decisions this year in the area of commutation. In *Decision 2009-445-AD* (April 16, 2010), the worker sought to have his permanent impairment benefit (PIB) commuted, to pay off his truck loan and make home improvements. The tribunal determined that given the worker's ability to return to carpentry work, he was not dependent on his PIB. It found that his plan to pay down debt and improve his familial home constituted an "approved purpose" as per the board's commutation policy, policy 3.9.5.

In *Decision 2010-409-AD* (October 14, 2010), the tribunal considered the argument that s. 4 of Policy 3.9.5 was inconsistent with s. 74 of the act, in that it unduly limited the general discretion to commute periodic payments. The tribunal found the structuring of discretion through the board's policy to be consistent with the act.

Decision 2010-480-AD (February 2, 2010) was somewhat novel in light of the intended use of the commuted benefit, which was the setting-up cost of a small marijuana "grow-op." The worker had a federally issued authorization to possess and produce marijuana for use in relation to a non-compensable eye condition. The tribunal approved the commutation noting that the worker was not suited for vocational rehabilitation and would spend less on producing his own marijuana than he spent on illicit or pharmacy-provided marijuana, with better control over quantity and quality.

Survivor Benefits

The tribunal considered the meaning of "dependant spouse" in the context of survivor benefits in *Decision 2010-297-AD* (August 16, 2010). The tribunal found that s. 2(ab) of the act; the definition of "spouse" did not concern spouses of formal marriages, and, therefore, the appellant could not be disqualified on the basis of a failure to co-habitate for a 12-month period. The tribunal went on to find, however, that because the appellant was not dependant on the deceased worker at the time of his death, she was not a dependant spouse pursuant to s. 60(7) of the act.

Vocational Rehabilitation (VR)

In *Decision 2010-262-AD* (September 28, 2010), the tribunal considered board policy 4.2.4R5, which provides for a $750 living allowance for workers in a VR program who must maintain a second residence. The tribunal relied on the Court of Appeal's decision in *Guy v. Nova Scotia (Workers' Compensation Appeals Tribunal)* to determine that the $750 living allowance was not an unreasonable and arbitrary exercise of the board's discretion, although it might be insufficient in some cases. The tribunal's interpretation of the policy led to the finding that travel expenses between the worker's home and his second residence were included within the $750 allowance. This case is currently before the Court of Appeal.

The tribunal, in *Decision 2010-167-AD* (January 31, 2011), considered policy 4.1.6 in relation to the board's denial of an EERB based on the worker's inability to take part in VR due to non-compensable depression. The tribunal determined that it was not the intent of the policy to deprive a worker of an assessment for EERB for a lengthy or indefinite period of time and that it contemplated only a temporary inability to take part in a VR program.

Internal Appeals

In *Decision 2010-384-AD* (September 29, 2010), the tribunal held that hearing officers should review case manager decisions on a correctness standard.

In *Decision 2010-563-AD* (November 30, 2010), there was an issue surrounding an extension of time to file a "Notice of Appeal to Hearing Officer." The extension had been granted by the manager of hearing officers. The tribunal found the manager of hearing officers' decision to have been rendered by a de facto hearing officer and noted that board staff members have broad discretion under s. 190 of the act to extend the 30-day time limit for filing an appeal.

In *Decision 2010-431-RTH* (December 14, 2010), an issue arose as to whether or not the tribunal should render a s. 251 re
argued that the issue of calculation of the long-term
tribunal, but not the issue of apportionment. She ar
of a s. 251 referral directing the hearing officer to co
of her benefit. The tribunal issued the RTH decision
had jurisdiction to issue the RTH and that the tribu
it implicitly, the question of entitlement to benefits (
appeal to the Court of Appeal).

Appeals from Tribunal Decisions

The tribunal is the final decision-maker in the workers' compensation process.

A participant who disagrees with a tribunal decision can ask the Nova Scotia Court of Appeal to hear an appeal of the decision. Such an appeal must be filed with the court within 30 days of the tribunal's decision. Under special circumstances, the court can extend the time to file an appeal.

The Court of Appeal can only allow an appeal of a tribunal decision if it finds an error in law or jurisdiction. The court does not re-determine facts or investigate a claim.

An appeal has two steps.

First, the person bringing the appeal must seek the court's permission to hear the appeal. This is called seeking "leave to appeal." Where it is clear to the court that the appeal cannot succeed, it denies leave without giving reasons and no appeal takes place. This year most applicants were denied leave to appeal.

Second, if leave is granted, there is an appeal hearing and the court will allow or deny the appeal.

During this fiscal year, 12 appeals from tribunal decisions were filed with the Court of Appeal:

- 11 decisions were appealed by workers
- 1 decision was appealed by an employer concerning compensation provided to a worker

During this fiscal year, 9 appeals were resolved as follows:

- 1 appeal was withdrawn
- leave to appeal was denied 5 times
- 2 appeals were decided by the Court of Appeal; both were denied
- 1 appeal was resolved by a consent order directing a rehearing

At the beginning of this fiscal year, there were 8 active appeals before the Court of Appeal. At the end of this fiscal year, there remained 11 active appeals.

Decisions of the Court of Appeal

The court decided two appeals this fiscal year:

Gillis-Andrea v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2010 NSCA 29

Ms Gillis-Andrea is a VON nurse who sought a finding that she had an acceptable claim for compensation.

While at home, she went to her car wearing her housecoat and sneakers, to get a work-related form. She slipped and fell in her driveway, breaking her ankle.

The tribunal found that her personal injury did not "arise out of and in the course of employment." In reaching this conclusion, the tribunal noted that Ms Gillis-Andrea was not being paid, or required to work, when she fell. Further, the risk of being in her driveway was not a risk she was exposed to by reason of her employment.

The court denied the appeal. It found that the tribunal stated and applied the correct legal principles and its application of the legal principles to the facts was reasonable. In other words, there was no error in law or jurisdiction.

MacDougall v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2010 NSCA 92

A Nova Scotia–based worker, while traveling on business in Newfoundland, was killed when the van Ms MacDougall was driving went off the road. Ms MacDougall was a co-worker of the deceased worker. She sought a finding that she could not be sued as she was protected from lawsuit by the act.

The appeal involved the "historic trade off" between most Canadian employees and employers. Simply stated, workers receive guaranteed no-fault compensation instead of being able to sue for damages for work-related injuries. Complex arguments were presented to the tribunal and Court of Appeal regarding the interplay between Newfoundland and Nova Scotia law.

The tribunal found that

- Nova Scotia's Workers' Compensation Act gave the deceased worker's estate and family a choice to be compensated according to the laws of Newfoundland instead of Nova Scotia.
- Newfoundland law, unlike Nova Scotia law, allows co-workers to be sued for workplace accidents that involve motor vehicles (if they choose not to accept workers' compensation).
- As the estate and family had elected Newfoundland law and had chosen not to accept workers' compensation benefits, their right to sue was not taken away by Nova Scotia's Workers' Compensation Act.

The court denied the appeal, finding that the tribunal had correctly interpreted and applied the law.

The court noted that, while all provincial workers' compensation acts are based on the same historic trade off, there are subtle differences between them. It stated at page 20 of the decision that

> Simply put, it is Newfoundland's as opposed to Nova Scotia's version of this trade off that applies in the special circumstances of this appeal.

Special Projects

The special projects officer, who headed a pilot project at the tribunal ending in December of 2009, explored ways to resolve appeals other than through a formal hearing. Since the departure of the special projects officer, the tribunal, primarily through the chief appeal commissioner, has referred appeals to the board's new liaison officer, holding a position created in February 2010. The hope is that intervention at this level may resolve the appeal before the tribunal. To date, there has been little impact at the tribunal as a result of this process.

The tribunal has continued to assist worker and employer participants without representation. They have been contacted by telephone, shortly after receipt of a notice of appeal. The object of the telephone contact is to reassure the participants that the proceeding before the tribunal will not be onerous or intimidating. It also gives a preliminary sense of the issues that are on appeal and the evidence anticipated by all participants. Frequently, in the case of self-represented workers, where there is no other participant, this call results in a speedy scheduling of the matter.

The tribunal spearheaded a sub-committee of the Issues Resolution Working Group, referred to as the Facilitation Sub-committee. The mandate was to explore early resolution possibilities at the tribunal. The sub-committee was comprised of two members from the tribunal, two members from the WAP, and two representatives from the board.

The sub-committee explored possible process changes designed to implement a more collaborative approach to resolving disputes within the workers' compensation system, and in particular, appeals before the tribunal. The sub-committee met four times between September 2010 and March 30, 2011. The sub-committee discussed various case studies involving represented and unrepresented participants and appeals where two or more parties participated. Both the board and the WAP endorsed the discussions and indicated a willingness to commit to a process that would be initiated by the tribunal to resolve appeals without a formal hearing.

The sub-committee's final report was not available as of March 31, 2011; however, the group was close to agreeing on a process that would proceed without the necessity of the tribunal passing a regulation. It would be voluntary, and the resolution would take the form of an AD or an RTH decision from the tribunal.

There was also consideration given to referring new evidence received by either the WAP or the tribunal to the liaison officer. It was agreed that if the referral were made, the appeal before the tribunal would remain open and scheduled for a hearing, if appropriate. The tribunal has continued to focus on early review, resolution, settlement, and prioritizing urgent matters. The tribunal intends to continue exploring ways to resolve appeals as quickly as possible through a means other than a formal hearing.

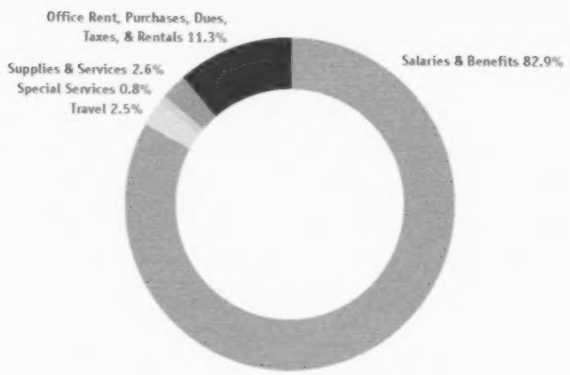
Financial Operations

In 2010–11, the tribunal's total expenditures were within 75.5 per cent of the original authority and within 97.4 per cent of our revised forecast. Net expenditures totaled $1,518,100, a slight decrease from the previous year (see Figure 12).

Figure 12

Budget Expenditures

(for the Fiscal Year Ending March 31, 2011)


Office Rent, Purchases, Dues, Taxes, & Rentals 11.3%
Supplies & Services 2.6%
Special Services 0.8%
Travel 2.5%
Salaries & Benefits 82.9%

Appendix

Figure 1 – Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 07-08	72	82	59	105	64	65	116	118	100	85	57	53	976
Fiscal 08-09	66	65	56	71	45	52	85	70	97	69	47	111	834
Fiscal 09-10	73	94	86	91	80	63	66	58	65	47	56	70	849
Fiscal 10-11	77	53	60	89	70	60	60	78	89	54	59	72	821

Figure 2 – Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 07-08	82	90	74	76	72	81	75	69	44	87	79	63	892
Fiscal 08-09	67	63	68	71	65	63	69	58	45	63	60	70	762
Fiscal 09-10	52	71	65	66	56	72	67	82	52	69	68	63	783
Fiscal 10-11	49	51	52	47	49	48	52	64	41	56	50	58	617

Figure 3 – Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 07-08	469	453	428	452	438	416	451	493	543	535	503	481
Fiscal 08-09	473	474	459	454	429	417	430	437	483	485	472	506
Fiscal 09-10	520	541	555	571	584	558	549	518	519	493	473	475
Fiscal 10-11	497	492	491	524	539	541	543	548	593	586	590	596

Figure 4 – Timeliness to Decision (cumulative percentage by month)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 07-08	0.22	4.14	16.91	39.08	57.45	70.10	80.29	84.99	88.58	90.59	93.84	100
Fiscal 08-09	0.79	2.76	9.71	27.56	46.33	61.94	71.78	80.84	86.09	90.81	93.18	100
Fiscal 09-10	0.89	4.60	17.75	33.97	49.81	64.62	74.84	81.23	85.19	88.12	90.29	100
Fiscal 10-11	0.97	5.02	18.96	35.82	47.97	57.05	64.99	72.45	77.15	82.50	84.76	100

Figure 5 – Decisions by Representation

Self-Represented	98
Workers' Advisers Program	356
Injured Worker Groups, Outside Counsel & Others	163

Figure 6 – Decisions by Issue Categories – Worker

Recognition of Claim	134
New/Additional Temporary Benefits	89
New/Increased Benefits for Permanent Impairment	233
Medical Aid (Expenses)	71
New/Additional Extended Earnings Replacement Benefits	76
New Evidence	18
Chronic Pain	132
Termination of Benefits for Non-Compliance	6
All other issues	75
Total	834

Figure 7 – Decisions by Issue Categories – Employer

Acceptance of Claim	8
Extent of Benefits	10
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	0
Other Assessment Issues	5
Total	23

Figure 8 – Decisions by Mode of Hearing

	Oral Hearings	Paper Review	Total
Fiscal 07-08	586	306	892
Fiscal 08-09	561	201	762
Fiscal 09-10	539	244	783
Fiscal 10-11	460	157	617

Figure 9 – Decisions by Outcome

Allowed	176
Allowed in Part	88
Denied	251
S29	0
RTH	102
Moot	0
Preliminary Decisions*	0
Correcting Decisions*	4
Total Final Decisions	617

**Does not reduce the number of appeals outstanding*

Figure 10 – Decisions by Appellant Type

	Total
Worker Claim Appeals*	599
Employer Claim Appeals	15
Employer Assessment Appeals	3
Section 29 Applications	0
Total	617

** Employer participation in worker appeals 29%.*

Figure 11 – Appeals Before the Courts at Year End

	Court of Appeal Active Matters	Appeals Before the Supreme Court of Canada	Total
Fiscal 07-08	18	0	18
Fiscal 08-09	10	0	10
Fiscal 09-10	8	0	8
Fiscal 10-11	11	0	11

Figure 12 – Budget Expenditures

(for the Fiscal Year Ending March 31, 2011)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,599,200.00	$1,256,400.00	$1,258,000.00
Travel	$56,000.00	$53,000.00	$37,800.00
Special Services	$85,000.00	$20,000.00	$11,800.00
Supplies & Services	$59,800.00	$48,700.00	$39,600.00
Office Rent, Purchases, Dues, Taxes, & Rentals	$210,500.00	$187,500.00	$170,900.00
Sub Total	**$2,010,500.00**	**$1,565,600.00**	**$1,518,100.00**
Less Recoveries	$0.00	$6,600.00	$0.00
Totals	**$2,010,500.00**	**$1,559,000.00**	**$1,518,100.00**